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DOMESTIC VIOLENCE AND JOINT CUSTODY: NEW YORK IS NOT MEASURING UP

BY TONIA ETTINGER

INTRODUCTION

Only by observing the family court system first hand can the inadequacies be truly understood. As a law school student I was given the invaluable opportunity to spend a substantial amount of time in Erie County Family Court helping victims of domestic violence obtain orders of protection.¹ These proceedings were naturally intertwined with bitter custody disputes. I saw time and again the push toward joint custody arrangements between the victim and the batterer.² This was accomplished systematically, both directly and indirectly.

Most of the women who came to Family Court were naturally terrified, not only because they were unfamiliar with the process, but also they were well aware of the dangers that could come about if their abusers learned of such proceedings. Some of the women filed for sole custody of their children simultaneously with a petition for an order of protection. Unknowingly, they believed that all final decisions would be made at this initial ex-parte proceeding. Myself or another domestic violence advocate would explain the general process to the victims we saw, but because of inherent flaws in the system or an overabundant amount of clients, not every victim was afforded that benefit.

Regardless of what transpired at the initial temporary protective order court proceeding, by the end of the day, the victims were well aware that their abusers were going to be served with the papers that were just filed. Often times, service would

¹ For my second year of law school I volunteered at Erie County Family Court through the Domestic Violence Task Force; sponsored by Haven House. The following summer I worked 30 hours a week for ten weeks at the same position. The Fall 2002 semester I completed my clinic placement there as well.

² Domestic violence has both male and female victims, but this paper will utilize female pronouns for the victim because more than 90% of victims of domestic violence are in fact female.

create increased conflict and safety concerns for the victim. I heard from countless clients at their second court appearance that the abuser was threatening to take the children away and that she would never be granted custody. In fact, many times the abuser would cross petition for sole custody of the children to increase the strength of his threat and further intimidate and control the victim.

Frequently the women would be given a referral to assigned counsel at their initial court proceeding. With or without an attorney, the Judge would push the parties to come to some agreement. While the option of having a hearing or trial was always given to the client, they were strongly encouraged to settle, for what I saw as mainly administrative reasons on the part of the court. Unfortunately, many times the women were not told that the Judge could only order joint custody by an expressed agreement of the parties.

Other reasons some victims opted for joint custody was the fear that if they did not agree to joint custody, the court might award sole custody to the abuser. This was a belief heavily perpetuated by the abuser himself. Seemingly, having joint custody is better than no custody at all. Another reason for agreeing to joint custody was to put an end to the numerous court proceedings. Victims would come back to court over and over again only to be given another return date. Finally, custody was frequently used as leverage by the abuser as well. The abuser would agree to withdraw his petition for sole custody, and agree to joint custody, if the victim agreed to dismiss the order of protection. Yet, she was still seldom informed by the court or her attorney that joint custody could not be awarded unless the parties expressly agreed.

My observations at Erie County Family Court prompted this paper, proposing that joint custody should never be granted in cases involving domestic violence and that New York should adopt a presumption against such an award. Part II will examine the custody laws in New York, including the 1996 amendments and "joint" custody. Part III focuses on the dangers of joint custody in cases of domestic violence. Part IV explores the presumption adopted by the Louisiana legislature as a model New York should

adopt. Part V will critique the inadequacies of the current New York statute and recommend that a presumption be adopted.

NEW YORK STATE CUSTODY LAWS

In 1962, Domestic Relations Law (DRL) Section 240 was enacted, which states in part that “the court shall...enter orders for custody and support as,...justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child.”³ The courts have repeatedly upheld this best interest of the child standard over the years. In fact, the Court of Appeals, in *Eschbach v. Eschbach*⁴ and *Friederwitzer v. Friederwitzer*⁵ clearly acknowledged that the best interest of the child is to be the standard governing child custody disputes.⁶

³ N.Y. DOM. REL. LAW § 240 (Consol. 2003).

⁴ 56 N.Y.2d 167 (1982).

⁵ 55 N.Y.2d 89 (1982).

⁶ The laws regarding child custody have transformed significantly over the last century. For thousands of years women and children were viewed as property of the husband/father and as such the men were entitled to complete control and custody. D. Lee Khachaturian, *Domestic Violence and Shared Parental Responsibility: Dangerous Bedfellows*, 44 WAYNE L. REV. 1745, 1749-1750 (1999); see also Linda R. Keenan, *Domestic Violence and Custody Litigation: The Need For Statutory Reform*, 13 HOFSTRA L. REV. 407, 410-411 (1985); Physically beating the wife or the child was a perfectly acceptable phenomenon in order for the man to exercise his authority and keep his “property” in place, Hon. Elliott Wilk, *Domestic Violence and Child Custody*, 296 PLI/EST 291, 294 (2000); In fact, up until 1977 wife battering was not a criminal offense in New York State, Keenan, *supra*, at 441 n.6; With such perceptions of the status of women and children at the time, it is little surprise that upon divorce women had no right to child custody, Khachaturian, *supra*, at 1749; Slowly, women became to be seen as more than merely economic non-entities and by the end of the nineteenth century the tender years doctrine emerged. This doctrine created a presumption that mothers were better able to care for young children, by nature, and was therefore favored in child custody disputes, Keenan, *supra*, at 412; Again, as society changed, the notion that mothers were naturally the better parent declined. In response, some states began to use the primary care taker doctrine when making child custody decisions. This presumption awarded custody to the parent who had been responsible for the day-to-day care of the child, and while the doctrine was gender neutral there was still a preference for mothers, Khachaturian, *supra*, at 1750; This preference for mothers continued

Defining the concept of "best interest" is a much more elusive concept, but through case law over the years a number of factors have been laid out for the court to consider. Factors considered by the court, pre 1996, include the stability of the living arrangement, the child's wishes, the relative fitness of the parents, the quality of the home environment, the location of siblings and the ability of each parent to provide for the emotional and intellectual development of the child.⁷ Notably however, "judges frequently define best interests in accordance with beliefs as to which they perceive general cultural agreement, which, in many cases, comports with their own subjective ideas of what is good for children."⁸ No factor is more dispositive than another and it is completely within the judge's discretion as to how much weight each individual factor is given.

New York was one state, among many, to adopt the best interest of the child approach, but many other state legislatures went a step further to put the parents on equal footing by including a joint custody provision in their custody statutes.⁹ Many fathers' rights groups saw this as a further step in avoiding the maternal preference in custody disputes.¹⁰ In fact, by 1995 over 40 states had provision or presumptions dealing with joint custody.¹¹ While there is not a universal definition for joint custody, it is typically understood to mean shared rights and responsibilities. Normally, the custodial parent makes day-to-day decisions, while both

mainly because they were the parent at home responsible for the child, while the man was employed outside of the home.

⁷ *E.g., Ostrander v. Ostrander*, 541 N.Y.S.2d 630 (1989); *see also Eschbach*, 56 N.Y.2d at 172-174.

⁸ Wilk, *supra* note 6, at 293. (Note again that a judge wrote this particular article).

⁹ Khachaturian, *supra* note 6, at 1751. (This is not to say that the courts were not awarding joint custody prior to this, it was simply not embodied in most statutes early on).

¹⁰ Barbara Handschu & Mark Kay Kisthardt, *Joint-Custody Pointers*, 7/17/00 NLJ A14 (Col. 1); *see also Khachaturian*, *supra* note 6, at 1751.

¹¹ Handschu & Kisthardt, *supra* note 10.

parents share decisions concerning major issues such as religion, education, and medical care.¹²

Although New York courts have a wide scope in choosing what is in the best interests of the child under DRL § 240, efforts to include a preference in favor of joint custody have repeatedly failed.¹³ In 1978, the New York Court of Appeals in *Brainman v. Brainman* interpreted DRL § 240 as it relates to joint custody by stating “joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in a mature civilized fashion. As a court-ordered arrangement imposed upon already embattled and embittered [parents]...it can only enhance familial chaos.”¹⁴ This premise still has vitality, some 24 years later, and it is important to note that nowhere in the New York State statute is joint custody mentioned.

In 1979, only a year after the *Brainman* decision but notably before *Eschbach* and *Friederwitzer*, the New York State Governor created a task force to study the effects of domestic violence observing that “[a] child who grows up in a home where one parent is beating the other is much more likely to grow up to be either a batterer or a victim of family abuse.”¹⁵ Sadly, it took seventeen years before the New York State legislature took affirmative action and it was not until May 21, 1996 that domestic violence became a statutory factor to be considered under certain circumstances when making a custody determination.¹⁶

Due to the heightened awareness of the effects of domestic violence, and research proving that witnessing domestic violence is harmful to children,¹⁷ DRL § 240 was amended stating,

¹² Harriet Newman Cohen, ‘*Brainman*’ Still Vital After 24 Years: Courts Try to Keep Warring Parents Involved When Joint Custody Not Possible, 7/15/2002 NYLJ 9, (Col. 1). The above list is not exclusive and may also include decisions on discipline, diet, summer camp, etc.

¹³ *Id.*

¹⁴ 44 N.Y.2d 584, 589-590 (1978).

¹⁵ Wilk, *supra* note 6, at 294.

¹⁶ *Id.*, see also Katherine M. Reihing, *Protecting Victims of Domestic Violence and Their Children After Divorce: The American Law Institute’s Model*, 37 FAM. & CONCILIATION COURTS REV. 393, 394 (July 1999).

¹⁷ H.R. Rep. No. 101-737, at 3 (1990) (Congressional report addressing the issue of child custody and domestic violence stating that children who witness abuse

"where either party to an action concerning custody of or a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of domestic violence...the court must consider the effect of such domestic violence upon the best interest of the child," when proven by a preponderance of the evidence.¹⁸

While the factor of domestic violence was added to the statute, *it is still within the judge's discretion as to how much weight the factor is given.*¹⁹

Today, over 40 states require domestic violence to be considered when making child custody determinations.²⁰ Only in New York are procedural and evidentiary standards necessary before the factor can be considered. These evidentiary standards can be extremely problematic if the standard is not met because the judge can then dismiss the evidence in its entirety. Additionally, the statute provides no guidance to judges' and he/she can choose to believe or disbelieve the proof. Adopting a presumption would solve many of the above problems.

"live in an atmosphere of emotional trauma, and are more prone to anxiety, depression, learning disabilities, and delinquency problems").

¹⁸ N.Y. DOM. REL. LAW § 240 (Consol. 2003); See also Lynne R. Kurtz, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALB. L. REV. 1345 (1997).

¹⁹ In many cases the judge took the 1996 amendment seriously and gave the factor substantial weight. *E.g.*, *In the Matter of E.R. v. G.S.R.*, 170 Misc. 2d 659 (Fam. Ct. Westchester Co. 1996) (the judge awarded sole custody to the mother, in opposition to the recommendations of the law guardian and the expert, because the father was abusive toward the mother); see also *In Matter of J.D. v. N.D.*, 170 Misc. 2d 877 (Fam. Ct. Westchester Co. 1996) (the judge awarded custody to the mother because the father was psychologically abusive); see also *In Matter of N. Children*, NYLJ Nov 19, 1996 at 26, col. 6, (Fam. Ct. NY Co.) & *In Matter of Tammy Irwin v. Peter Schmidt*, 236 A.D. 2d 401 (1997) (both courts awarded custody to the mother because of the fathers repeated acts of domestic violence).

²⁰ Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, 36 NO. 4 JUDGES' J. 38, 40 (Fall 1997).

New York case law provides further evidence of the need for the presumption. In *Houck v. Garraway*, the court granted the mother and father joint custody despite evidence of domestic violence on the part of the father.²¹ In *Hugh L. v. Fhara L.*, the court discusses for pages how the parties are unable to cooperate and goes on to outline the details of husband's arrest after he pulled her hair out and kicked her because she broke a dish.²² The court states, "it is clear that joint custody cannot succeed because the parties are incapable of working together"²³ yet a few paragraphs later the court awards spheres of legal decision-making. The court stated that, "each parent shall be responsible for the ultimate decision in certain areas, but will be required to consult with the other parent."²⁴ If the parties are required to consult on the decisions all the problems of joint custody outlined above still exist.

On the other hand, it may seem like the current law is working because the numbers of reported cases are very limited; however, this should be a signal of the deeper underlying problems. First, many family law decisions are unreported, especially if the parties were never married. This creates a false sense of security that the law is working as it should. Secondly, joint custody is often granted by agreement of the parties, therefore the cases would not be reported. However, once the victim realizes that the joint custody arrangement is impossible, she might simply try to seek a stay away order of protection instead of a modification and as such DRL § 240 would not apply. However, if she did try to modify the prior order she would no longer be subject to the standard outlined in the DRL § 240, because in order to modify an existing custody order she would have to show a substantial change in circumstances. It is important that these problems are not overlooked.

Further, in 1990, the United States Congress unanimously passed a resolution calling on states to modify their laws to include

²¹ 293 A.D. 2d 782 (2002).

²² 6/1/2000 N.Y.L.J. 29, (Col, 6) (June 1, 2000).

²³ *Id.*

²⁴ *Id.*

a presumption against granting custody to batterers.²⁵ Additionally, the Model Code on Domestic and Family Violence also recommends a rebuttable presumption against awarding an abusive parent sole or joint custody.²⁶ These resolutions are clear and the only conclusion left to draw is that New York has ignored these recommendations despite all the current evidence. It is time for New York to fall in line and measure up to not only the recommendations provided, but also to other states around the nation.

DANGERS OF JOINT CUSTODY IN CASES OF DOMESTIC VIOLENCE

Domestic violence is a real and growing problem in the United States. This phenomenon cuts across all socio-economic lines and knows not race, age or gender. Shockingly, in the United States, a women is beaten every fifteen seconds.²⁷ Statistics further show that danger levels increase significantly for women post-separation.²⁸ By continuing to award joint custody in the face of domestic violence, our courts are placing millions of Americans in unnecessary danger. Many of the dangers are separate and distinct from those faced in cases of domestic violence and separation and domestic violence and visitation. Fortunately, New York does not have a presumption for joint custody, but it is still awarded in many inappropriate circumstances, namely where domestic violence is present.

In order for joint custody to be a viable alternative, it is necessary that a few basic criteria be in place. First, both parents should be committed to making the joint custody arrangement work and have a good understanding of their respective roles in the joint custody plan.²⁹ Secondly, parents must also be willing to

²⁵ H. Con. Res. 172, 101st Cong. (1990).

²⁶ NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE, Sec. 401 (1994), *available at* http://www.ncjfcj.org/dept/fvd/publications/main.cfm?Action=PUBGET&Fileame=new_modelcode.pdf

²⁷ Kurtz, *supra* note 18, at 1345.

²⁸ Khachaturian, *supra* note 6, at 1757.

²⁹ JAY FOLBERG, ed., JOINT CUSTODY AND SHARED PARENTING 13 (1984).

negotiate any differences that may arise, separating the husband/wife roles from their parental roles.³⁰ When joint custody is granted, parents still have to collaborate to raise their child, therefore there also needs to be a reasonable level of communication and cooperation as well as flexibility.³¹ Thirdly, there is a need for equal power and control. Domestic violence exists in a relationship because of power and control exerted by the abuser. This dynamic negates the ability of the victim to voluntarily consent to joint custody and to willingly and safely collaborate as a joint parent.

Admittedly, joint custody can work for parents who are able to put their differences aside for the sake of the children, but in situations where domestic violence exists there is this underlying and overlooked power and control factor on the part of the abuser. The abuser is not able to understand his role in the joint custody plan because the focus is entirely on regaining power.³² His role as husband and parent is one in the same. As such, by awarding joint custody to an abuser, the court is condoning his behavior and arguably helping him maintain control of his victim and providing him the opportunity to continue the victimization.³³

Often times, parents who have joint custody have to collaborate on decisions such as education, religion and medical care. Let us first deal with education. Most of the time, the school attended by the child will be dictated by place where the child resides.³⁴ This leaves little room for negotiation. In situations of domestic violence, joint custody allows the abuser to have access to the child at school, as well as all school records. This alone presents a number of problems. Firstly, having access to the school records could very possibly disclose confidential information, such as the address of the victim, phone number or place of employment.

³⁰ *Id.*

³¹ *Id.* at 14.

³² The above is a generalization, and while there are always exceptions, it is true in most cases.

³³ See generally Khachaturian, *supra* note 6, at 1770.

³⁴ JAMES C. BLACK & DONALD J. CANTOR, CHILD CUSTODY 25 (1989).

Secondly, most of the time joint custody decrees allow the abuser to pick the children up from school at any given time. This allows the abuser to continue to threaten to take the children if certain conditions are not met, and in fact do so upon his dissatisfaction. For example, over the summer I met with a client, with a history of physical, emotional and sexual abuse, who had joint custody. Each day, the father would pick the child up from day care and refuse to return the child home until the mother agreed to have sexual intercourse with him. Fearing that she would not be able to see her daughter she conceded to his demands for nearly a week. She came to family court to get the order modified and to obtain an order of protection, but the sad reality is that I never once saw a custody order temporarily modified, therefore she was forced to endure the situation until the proceedings were over, which could very easily take months. In another situation involving a history of domestic violence and an award of joint custody, a father picked his two young children up from school and refused to take them home. The mother contacted the police who refused to go get the children because of the joint custody order.

Evident by the above examples, the abuser used the award of joint custody to continually manipulate and harass his victim by using the children as pawns and as a means of access. Even in situations where the victim has sole custody, the abuser will still have access to the children via a visitation schedule. However, the difference with sole custody is that the victim can provide a copy of the order to the school and expressly prohibit the abuser from picking up the children. Joint custody places the parents on equal footing.

Joint custody and medical care also presents a number of unique problems. Again, as with school records, access to medical records could potentially disclose confidential information. In reality, absent major operations or complications, there is little to negotiate. Many times the child will already have a pediatrician, one he has been going to his entire life. Granting access to the records enables the abuser to become aware of appointment dates and times. In most circumstances, a parent should have every right to know when his child is sick, but again abusers are more often

concerned with the quest for continued control. He can go to the appointments and cause a scene for the child and the mother.

Perhaps a greater danger of the medical access, and again a situation I witnessed during my clinic placement, is the ability to make and cancel appointments for the child. An abuser can make appointments for the child and quite possibly the mother will never know about them. The abuser tries to use this apparent "neglect" against the mother in his future petition for sole custody. However, the ability to cancel the appointments is probably a more powerful means of control. If the abuser cancels the appointment a number of issues arise. First, most likely the child will not get seen by the doctor, confirming the notion that his interests are above that of the child. Second, by canceling the doctor's appointment, the abuser may be again controlling the economic viability of the victim. If she does not get fired for taking too many days off, she may not be getting paid for the additional days she had to take off for the second, or third or even fourth appointment.

Even more problems may arise if the two parents do not agree on the medical diagnosis and only one parent is administering medication to the child. Extreme health conditions for the child could arise if she is only receiving medication while in the care of one parent and not the other. Similarly, problems may occur if parents do not agree on methods of treatment and are administering two different forms of medication to the child. These drugs could quite possibly interact negatively within the child's system causing additional health problems.

Finally, allowing the abuser medical access gives him the opportunity to distort and twist the medical history of the child. He can blame scars, broken bones or other conditions on the mother making her appear neglectful. The abuser could also make up reasons for injuries. For example, if a child fell down and sustained a bump on his head the abuser is able to take the child to the doctor. He can then tell the doctor anything he chooses about the cause of said injury including that the mother struck the child. The child may not be old enough to clearly articulate what really transpired. Since the doctor is a mandated reporter, by law, he will be forced to report the alleged incident to Child Protective Services

(CPS). The abuser may then try to use these self-created allegations and CPS investigation in any subsequent child custody disputes. None of these problems would arise if a joint custody order were not in place. An order granting sole custody to the victim would allow that individual to prohibit the abuser from taking the child to the doctor without permission, making appointments, canceling appointments, and examining medical records simply by communicating these wishes with the doctor's office. All of the mechanisms used by the abuser are his way of maintaining control and creating continued abuse and safety concerns for the victim.

Another problem that arises because of joint custody agreements is the potential endless court disputes over issues regarding the child. In *Trapp v. Trapp*, the father litigated virtually every child-rearing issue because he was unwilling to compromise,³⁵ a loss of control in the eyes of an abuser. While the court eventually eliminated the joint custody arrangement, it is important to note that it took nearly a year. Again, endless court disputes such as this create a tremendous financial strain on the victim. Often times she is forced to quit her job, and if she is fortunate enough, she will be given an assigned attorney, but this still does not take into account the cost of child care while she spends an exorbitant number of hours in court.³⁶ This could also lead to a number of potential dangers for the child. For example, the father could refuse to allow his child to get an operation. It is quite possible that the child could be severely harmed in the interim.

Joint custody clearly perpetuates the cycle of violence, the same cycle the woman was trying to escape from and the same cycle she tried to protect her children from. Studies of joint custody have shown that children have more behavioral and social problems when there is conflict and chaos between their parents.³⁷

³⁵ 136 A.D.2d 178 (1988).

³⁶ Erie County Family Court has attempted to combat this problem by providing free, secure day care facilities in the building.

³⁷ Judith S. Wallerstein & Janet R. Johnston, *Children of Divorce: Recent Findings Regarding Long-Term Effects and Recent Studies of Joint and Sole*

By allowing joint custody to be granted where domestic violence exists, the courts are systematically neglecting the children, directly counter to their commitment to do what is in the child's best interest. All of these dangers are distinct from those faced in situations where the abuser only has visitation.

Finally, as clearly seen above, joint custody makes a mockery of the system because it allows access and power to the batterer to further threaten and control the victim. This is the same system that has ignored the impact of domestic violence, despite clear evidence of its effects and the same system that promised to serve the "best interests" of the child.³⁸ Now, because of the system, the abuser is able to use the children as tools to serve *his* best interests.³⁹ The New York approach should be modified to reflect the above dangers.

LOUISIANA APPROACH

Louisiana has one of the most specific presumptions against awarding joint custody to an individual with a history of domestic violence.

The legislature further finds that the problems of family violence do not necessarily cease when the victimized family is legally separated or divorced. In fact, the violence often escalates, and child custody and visitation becomes the new forum for the continuation of the abuse. Because current laws relative to child custody and visitation are based on an assumption that even divorcing parents are in relatively equal positions of power, and that such parents act in the children's best interest, these laws often work against the protection of the children and the abused spouse in families with a history of family violence.⁴⁰

Custody, 11 PEDIATRICS REV. 197, 200 (1990); *see also* Handschu & Kisthardt, *supra* note 10.

³⁸ Khachaturian, *supra* note 6, at 1770.

³⁹ *Id.*

⁴⁰ LA. REV. STAT. ANN § 9:361 (2003).

Using the above, Louisiana created a presumption that "no parent who has a history of perpetuating family violence shall be awarded sole or joint custody of the child."⁴¹ This presumption can be overcome by a preponderance of the evidence, but the law insists that the abuser prove he has successfully completed a treatment program, is not abusing drugs and alcohol and that it is in the child's best interest.⁴² Further, if a parent is found to be a spousal abuser, that parent is only allowed supervised visitations, by statute, until a treatment program is completed.⁴³ Thereafter the abuser may have unsupervised visitation if he can prove to the court, by a preponderance of the evidence, that he completed the program and the other requirements outlined above.⁴⁴

This presumption in the Louisiana statute has been more than just a law on the books. The courts have enforced this presumption time and again. For example, in *Hicks v. Hicks*, the Court of Appeal of Louisiana reversed the award of joint custody because the trial court failed to apply the provisions of the Louisiana Revised Statute § 9:364.⁴⁵ Ms. Hicks testified that Mr. Hicks hit her in the stomach while she was pregnant, broke brooms over her, forced her to have sex with him, hit her in the face and threw her into a chair.⁴⁶ In reversing the trial courts decision, the Court of Appeal repeated much of the language of Louisiana Revised Statute § 9:364 and stated, "as this statute is clear and unambiguous, it is to be applied."⁴⁷

Additionally, in *Michelli v. Michelli*, the Court of Appeal affirmed the trial court's decision to award sole custody to the mother because the husband was physically abusive to her and the children.⁴⁸ Testimony at trial indicated that Mr. Michelli hit his wife in the face, called her derogatory names on a number of

⁴¹ LA. REV. STAT. ANN § 9:364 (2003).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 733 So. 2d 1261, 98-1527 (La. App. 3 Cir. 05/19/99).

⁴⁶ *Id.* at 1263.

⁴⁷ *Id.* at 1265.

⁴⁸ 655 So. 2d 1342, 93 CA 2128 (La. App. 1 Cir. 05/05/95).

occasions, slapped her, punched her, and shoved her repeatedly.⁴⁹ Again the court simply reiterated the language of the statute. Finally, in *G.N.S. v. S.B.S.*, the Court of Appeal modified a joint custody award and awarded sole custody to the father after it was found that the mother, who has a history of family violence, was physically abusing the child.⁵⁰ Here again, the statute is so clear that all the court did was cite sections outlined in Louisiana Revised Statute § 9:364.⁵¹ Additionally the court upheld the award of costs imposed on defendant because of the family violence.⁵² Louisiana Revised Statute § 9:364 provides in part, which the court outlines, that “in any family violence case, all court costs, attorney fees, evaluation fees, and expert witness fees incurred in furtherance of this Part shall be paid by the perpetrator of the family violence.”⁵³

These cases show the broad scope of the statute adopted by the Louisiana legislature. It goes well beyond spousal abuse and includes all family violence. The statute is clear enough that the court has to do minimal, if any, statutory interpretation. With a statute this specific it makes it very difficult for an abuser to continue to control the victim during the custody dispute. Furthermore, the court is obligated to inform the victim of this presumption because it is codified.

NEW YORK CRITIQUE & RECOMMENDATIONS

New York does not have the benefits of a statute like the one found in Louisiana. New York has embraced what many call a “family systems” approach, “which views the family unit as enduring following divorce, with both parents continually involved with the children, almost no matter what.”⁵⁴ The 1996 amendment to the DRL § 240 was not enough and New York should create a statutory presumption against awarding sole and joint custody to

⁴⁹ *Id.* at 1347.

⁵⁰ 796 So.2d 739, 35,348 (La. App. 2 Cir. 9/28/01).

⁵¹ *Id.* at 753.

⁵² *Id.*

⁵³ LA. REV. STAT. ANN § 9:367 (2003).

⁵⁴ MARY ANN MASON, *THE CUSTODY WARS* 152 (1999).

an abuser. As seen above, under the law as it currently stands, domestic violence is only considered as a factor when it is raised in a sworn petition, complaint or responsive pleading.⁵⁵ However, this does not deal with any violence not reported in a sworn petition.

Many argue that creating a presumption will increase the number of false allegations in order to have leverage in the custody disputes,⁵⁶ but this perceived problem can be overcome by adopting a preponderance of the evidence standard, meaning that domestic violence has to be shown by a preponderance of the evidence. Additionally, the American Psychological Association has stated, "false reporting of family violence occurs infrequently."⁵⁷ Others argue that custody determinations are best left to the courts,⁵⁸ but there is an inherent education problem with that theory, meaning that in order to leave the decision up to the courts, judges and lawyers have to be well educated about the effects of domestic violence. Even if such education were to take place, it still does not account for the individual subjectivity on the part of the judge. Ideally, statewide education should be implemented simultaneously with the legislative presumption against joint custody.

CONCLUSION

Joint custody...assumes an equity of power that is lacking in families where violence is or has been prevalent. Meaningful separation is almost impossible for a jointly parenting victim of abuse given the requirement that parents participate equally in decision-making. Joint custody essentially requires a battered parent to jeopardize

⁵⁵ N.Y. DOM. REL. LAW § 240 (Consol. 2003).

⁵⁶ Kurtz, *supra* note 18, at 1372.

⁵⁷ AMERICAN PSYCHOLOGICAL ASSOCIATION, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 12 (1996).

⁵⁸ Kurtz, *supra* note 18, at 1373.

her safety by mandating frequent and potentially conflict-laden interaction with the abusive parent.⁵⁹

It is certainly time that measures are taken to combat the inherent problems and conflicts associated with domestic violence and joint custody. Victims of domestic violence certainly have enough problems to deal with in regards to visitation and post separation. The courts should not continuously add to these problems by granting joint custody with the abuser and, further, not informing victims that joint custody cannot be awarded without their consent. Only by adopting a presumption against the award of joint custody can women be on their way to having *former* abusers, because joint custody simply perpetuates the cycle.

In the interim, the awareness of the dangers of joint custody and domestic violence needs to be made known to all those in the legal arena but especially to advocates, attorneys' and judges'. This can be accomplished through mandatory education. Moreover, the courts should ensure that all victims have ample time to meet with an educated advocate in order to have all their options thoroughly explained to them. Additionally, the court should inform the victim that it does not have the authority to grant joint custody without the consent of both parties. These intermediate efforts are absolutely necessary; however adopting a statutory presumption would lessen the need for the victim to be entirely informed⁶⁰ because, by law, the judge would have to consider the incidents of domestic violence and the dangers that accompany such violence when joint custody is considered.

⁵⁹ Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do For Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 255 (1999).

⁶⁰ This by no means is suggesting that a victim should not be entirely informed whenever possible even if a presumption exists.

